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39-7212

No. _____

Supreme Court, U.S.
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JAN 16 1990
JOSEPH F. SPANIOLO, JR. CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

AVON DAVIS, PETITIONER

v.

LOUIS W. SULLIVAN, SECRETARY
OF HEALTH AND HUMAN SERVICES

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

ANTHONY W. BARTELS
316 South Church
P. O. Box 1640
Jonesboro, Arkansas 72401
(501) 972-5000

ATTORNEY FOR PETITIONER

45 ro



QUESTION PRESENTED

The question presented in this case is whether the Secretary of Health and Human Services should be permitted to ignore his own regulations pertaining to the withholding of attorney's fees from past due Title II Social Security disability cases.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

AVON DAVIS, JR., PETITIONER

v.

LOUIS W. SULLIVAN, SECRETARY
OF HEALTH AND HUMAN SERVICES

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT**

Anthony W. Bartels petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported, but is attached hereto as Appendix A. The opinion of the district court is unreported, but is attached hereto as Appendix B. The Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc of the Court of Appeals is attached hereto as Appendix C.

JURISDICTION

The judgment of the Court of Appeals (App. A) was entered on October 25, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant provisions of Title II of the Social Security Act, 20 C.F.R. § 404.1720 (b) (4), 20 C.F.R. § 1730 (b), and 20 C.F.R. § 404.501 (a) (8), are set forth in Appendix D.

STATEMENT

This case concerns 20 C.F.R. § 1720 and 1730, which involve fees for a representative's services on a Title II claim. In a Title II claim, the Social Security Administration is to withhold and pay the attorney's fee directly to the attorney from a claimant's past due benefits. The case also concerns 20 C.F.R. § 404.501 (a) (8), which provides

for adjustment in cases where, through error, a payment of past due benefits is made to an individual and such payment has not been reduced by the amount of attorney's fees payable directly to an attorney under section 206 of the Act.

1. In this case, petitioner (hereinafter claimant) had an attorney, Anthony W. Bartels who represented the claimant at the administrative level and at the Court level.

On 3/19/87 Bartels petitioned the District Court for an attorney's fee in the sum of \$5,201.93, which represented one-fourth of the claimant's past due and interim benefits combined. On 6/22/87, the District Court awarded Bartels' attorney fees and costs under the Social Security Act in the amount of \$2,171.25 for work performed before the Court, or 25% of the past-due benefits, whichever was less.

X

V

On 6/22/87, Bartels then petitioned the Social Security Administration for the remainder of one-fourth of past due and interim benefits in the amount of \$3,030.68.

On 9/21/87, the Secretary replied, advising Bartels that since the court order limited a total fee to 25% of past due benefits, which was \$1,551.30, no further fee would be authorized. (See Appendix E).

On 9/25/87 Bartels informed the SSA that pending before the Eighth Circuit was a case which dealt with the issue of whether interim benefits were to be included when calculating attorney fees, and asked the Secretary to hold up on his fee petition until this case had been decided (See Appendix F). The case was Gowen v. Bowen, 855 F. 2d 613, 618-19 (8th Cir. 1988).

On 10/26/87, the Secretary agreed to hold Bartels fee petition until the Eighth



Circuit Court of Appeals issued its decision on Gowen (See Appendix G).

On 9/16/88, Bartels sent to the Secretary a copy of the Eighth Circuit's ruling in Gowen, in which the Court held that interim benefits were to be included when calculating attorney's fees, and asked the Secretary to act on his fee petition (See Exhibit H).

On 10/20/88, the Secretary acknowledged receipt of the Gowen decision, but still maintained the position that \$1,551.30 was 25% of past due benefits and refused to take any action on Bartels' fee petition for work performed at the administrative level (See Appendix I).

Although the Secretary was aware of the ruling in the Gowen case, he refused to recognize that interim benefits were a part of the past due benefits, and refused to pay any more than \$1,551.30 of the Court-ordered fee or to award any fee for



work performed at the administrative level.

Seeing no other remedy available to him, Bartels filed a motion to hold the Secretary in contempt of court on 10/31/88. On 12/14/88 the U. S. District Court entered an Order denying Bartels' motion, which was affirmed by the Eighth Circuit Court of Appeals on 10/25/89. Bartels' Petition for Rehearing was denied on 12/12/89, by reason of the lack of a majority of the active judges voting to rehear the case en banc (App. C).

REASONS FOR GRANTING THE PETITION

1. The basis for this Petition is to direct the Court's attention to actions of the Secretary of Health and Human Services, who, in this case, has ignored his own regulations pertaining to the withholding of attorney's fees from past due Title II Social Security disability cases. Further, the Secretary ignored the Eighth Circuit ruling that interim



benefits were to be included in calculating attorney's fees.

The Secretary, in error, released a portion of the past due benefits which should have been withheld for attorney's fees to the claimant in the form of interim benefits. The Secretary failed to recognize that "interim" benefits should have been included when calculating attorney's fees.

Ordinarily, in a situation where the claimant is overpaid benefits which should have been withheld for attorney's fees, the Secretary would pay the attorney's fee, then recoup the overpayment from the claimant pursuant to 42 U.S.C. § 404, which deals with overpayments. However, in this instance, the Secretary failed to recognize that "interim" benefits were part of the past due benefits, and declined to pay more than \$1,551.30 of the Court-ordered fee, or to award a fee for administrative work, because of his belief



that interim benefits were not to be included in calculating attorney's fees.

The District Court denied Bartels' motion to hold the Secretary in contempt of court. Bartels' appealed, and asked the U. S. Court of Appeals to retroactively apply the case of Gowen v. Bowen, 855, F. 2d 613, 618-19 (8th Cir. 1988), which held that interim benefits must be included as part of the past due benefits for the purposes of calculating attorney's fees. The U. S. Court of Appeals for the Eighth Circuit affirmed the lower Court's denial of the contempt motion against the Secretary of HHS.

The fact that the defendant/appellee in this case is the Secretary of HHS, does not exempt him from the contempt process. Indeed, Fed. R. Civ. P. 45 (b) explicitly provides that "any person who disobeys an order of the court may be held in contempt."



In Hillhouse v. Harris, 715 F. 2d 428

(8th Cir. 1983), the Court stated:

" . . . [W]e note the Secretary continues to operate under the belief that she is not bound by district or circuit court decisions. In its findings the Appeals Council states, 'the Secretary is bound only by the provisions of the Social Security Act, regulations and rulings, and by United States Supreme Court decisions. A district or circuit court decision is binding only in the specific case it decides.' 547 F. Supp. at 92"

". . . and the Secretary will ignore the principle at his peril."

A concurring opinion is even more strongly worded:

" . . . While I concur wholly in everything said in the majority opinion, I think more is needed to be expressed. I have no wish to invite a confrontation with the Secretary. Yet, if the Secretary persists in pursuing her nonacquiescence in this circuit's decisions, I will seek to bring contempt proceedings against the Secretary both in her official and individual capacities."

Hillhouse at page 430.

In the instant case, the Secretary does persist in pursuing nonacquiescence of 8th Circuit Court decisions. The Secretary was aware of the 8th Circuit's ruling that "interim" benefits were to be included in the calculation of attorney's fees, but he refused to include the claimant's interim benefits in calculation of attorney's fees. The Secretary should be held in contempt of court because of his continuing nonacquiescence of 8th Circuit decision and because the Secretary failed to pay the Court-ordered attorney's fee in the amount of \$2,171.25, which was a much lesser sum than the full 25% of "past due benefits" when interim benefits are included in the calculation of "past due benefits."

Although the U. S. Court of Appeals in this case did not wish to hold the Secretary in contempt, the Court declined to address the issue of whether the Gowen case should be applied retroactively.



"A general rule in Anglo-American jurisprudence is that judicial decisions are to be applied retroactively. . . The concept stems from the Blackstonian view, that judges do not make law; they find law. Judicial declaration of law is merely a statement of what the law has always been." Cash v. Califano, 621 F. 2d 626, 628 (1980). Since usual procedure requires decisions to be applied retroactively, the refusal of a Court to do so is the exception as opposed to the rule. In Chevron Oil Co. v. Hunson, 404 U.S. 97 (1971), the Supreme Court presented a three part test in determining whether a decision should be refused retroactive application:

1. "The decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants have relied . . . or by deciding an issue of first impression whose resolution was not clearly preshadowed."
2. The Court must "weigh the merits and demerits in each case by



looking to the prior history of the rule in question, its purpose and affect, and whether retrospective operation will further or retard its operation."

3. Finally, the Court must weigh the "inequity imposed by retroactive application, for '[w]here a decision . . . could produce substantial inequitable results if applied retroactively, there is ample basis . . . for avoiding the injustice or hardship by a holding of nonretroactivity.'"

Id at 106-107.

The Secretary in this case failed to withhold sufficient funds to pay plaintiff's fee in this case, which is a violation of his own regulations. Further, by refusing to authorize a fee for administrative work, the Secretary failed to follow the Eighth Circuit ruling that interim benefits were to be included in calculating attorney's fees. The Secretary of HHS has violated Bartels' right to due process of law by releasing his money to the claimant as an underpayment, and then by refusing to



follow 20 C.F.R. § 404.501 (a) (8), 20 C.F.R. § 404.1720 (b) (4) and 20 C.F.R. § 404.1730 (b).

Even though the Secretary was aware of the Eighth Circuit Court's ruling in the Gowen case, it did not follow the decision. This is part of the "nonacquiescence" policy of the Secretary.

This same issue was brought before the Supreme Court in the case of Clifford Trekas v. Louis W. Sullivan, Secretary of Health and Human Services, No. 88-2069, but the Court declined to hear that case. Yet, on numerous occasions, the Secretary has continued to release all funds to the claimants prior to withholding attorney's fees from retroactive benefits and interim benefits.

The petitioner in this case has also petitioned this court for a writ of certiorari to the U. S. Court of Appeals for the Eighth Circuit on another case very similar to the instant one. That



case is Jerry Russell v. Secretary of HHS, U. S. Court of Appeals for the Eighth Circuit Number 89-1714, decided 10/12/89.

The Secretary should be instructed to follow these regulations and the decisions of the Eighth Circuit, and correct his error by paying the attorney's fee, and recoup the overpayment from the claimant's future benefits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

ANTHONY W. BARTELS
Attorney at Law
316 South Church
Jonesboro, Arkansas 72401
(501) 972-5000

January 11, 1990.



APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 89-1042

AVON DAVIS, APPELLANT

v.

LOUIS W. SULLIVAN, SECRETARY OF
HEALTH AND HUMAN SERVICES, APPELLEE

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF ARKANSAS

Before BOWMAN and MAGILL, Circuit
Judges, and HARPER, Senior District Judge.

PER CURIAM

The issue in this case is whether the
district court¹ abused its discretion in
denying a motion by the claimant's

1. The Honorable Roy W. Harper, Senior
United States District Judge for the
Eastern District of Missouri, sitting by
designation.



attorney to hold the Secretary of Health and Human Services in contempt for failure to comply with the district court's order awarding attorney's fees. Because the Secretary fully complied with the order, we affirm.

The claimant, Avon Davis, was represented by an attorney, Anthony Bartels, in administrative and district court proceedings concerning the termination of his disability insurance benefits. In March 1984, the Secretary determined that Davis' disability had ceased and he was no longer entitled to disability insurance benefits. Davis appealed this decision to the district court. The case was remanded for further administrative review following enactment of the Social Security Disability Benefits Reform Act of 1984.² During the pendency of administrative proceedings on remand,

2. 42 U.S.C. § 423 (1982 & Supp. V 1987).

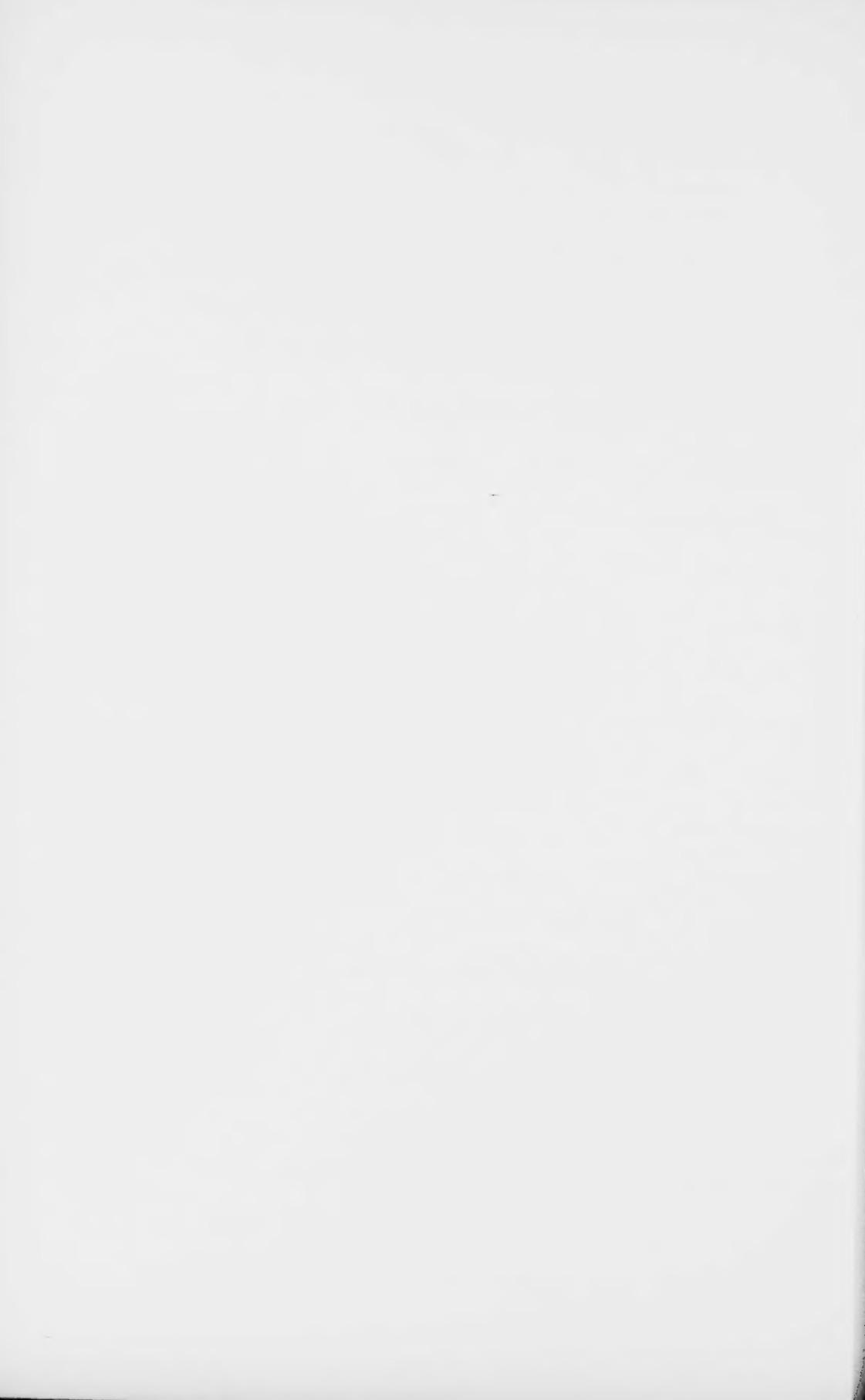
Davis received approximately \$15,000 in interim benefits. In January 1987, the Secretary reinstated Davis' benefits. The Secretary then notified Davis in February 1987 that his past due benefits totaled \$6,205.20 and that twenty-five percent of this amount (\$1,551.30) would be withheld for payment of authorized attorney's fees. The Secretary did not include interim benefits as part of past due benefits in calculating the amount to be withheld.

On March 19, 1987, Bartels petitioned the district court for \$5,201.93 in attorney's fees. In response, the district court entered an order on June 22, 1987, that concluded as follows:

THEREFORE, it is Ordered and Decreed that an attorney's fee and costs in the amount of \$2,171.25 from the past due benefits due the plaintiff herein, is hereby allowed to Anthony W. Bartels, the plaintiff's attorney, pursuant to 42 U.S.C. § 406 (b) (1). The defendant is hereby ordered to compute, certify and pay said attorney this sum, in addition to any fees found to be due for representation at the

administrative level, or twenty-five percent of the plaintiff's past due benefits, whichever sum is less.

Davis v. Bowen, No. J-C-84-136, slip op. at 2-3 (E.D. Ark. June 22, 1987). In July 1987, the Secretary released \$1,551.30 to Bartels, which represented twenty-five percent of Davis' past due benefits as calculated by the Secretary. Thirteen months later, this court held in Gowen v. Bowen, 855 F. 2d 613, 618-19 (8th Cir. 1988), that interim benefits must be included as part of past due benefits for the purpose of calculating allowable attorney's fees. On October 31, 1988, two months after Gowen was decided, Bartels filed a motion in the district court to hold the Secretary in contempt for failure to comply with the district court's June 1987 order awarding attorney's fees. The motion requested an order requiring payment of (1) the remainder of the court-ordered fee (\$619.95); (2) fees for services performed at the administrative



level out of the amount remaining from twenty-five percent of past due benefits; and (3) attorney's fees for bringing the contempt motion. The district court denied the motion without comment. This appeal followed.

II.

Our review of the denial of a contempt motion is limited to determining whether the district court abused its discretion. Barnes v. Bosley, 828 F. 2d 1253, 1259 (8th Cir. 1987).

The authority to award attorney's fees for services performed at the administrative level is committed by 42 U.S.C. § 406 (b) (1) (1982) to the Secretary and may not be exercised by the courts. Fenix v. Finch, 436 F. 2d 831, 838 (8th Cir. 1971); Gowen, 855 F. 2d at 618 (citing Fenix). In its June 1987 order, the district court expressly recognized this limitation on its authority to award attorney's fees and



directing Bartels to "petition the Secretary for any fees requested in relation to representation at the administrative level." Davis, slip op. at 2. Thus, the Secretary cannot be held in contempt for not paying fees for services Bartels provided at the administrative level. The issue, then, comes down to whether the Secretary disobeyed the district court's order by not paying Bartels an additional \$619.95 for representation provided at the district court level.



Attorney's fees for representation at the district court level are limited by § 406 (b) (1) to twenty-five percent of past due benefits. The district court expressly noted this cap on fees, Davis, slip op. at 1, and stated that the Secretary would coordinate any fees granted for services at the administrative level with its award so that the total allowed fee would not exceed twenty-five percent of past due benefits.

Id. at 2.³

-
3. We note that those circuits which have addressed the issue agree that the aggregate of fees awarded at the judicial and administrative levels may not exceed twenty-five percent of past due benefits. Guido v. Schweiker, 775 F. 2d 107, 108 (3d Cir. 1985); Morris v. Social Sec. Admin., 689 F. 2d 495, 497-98 (4th Cir. 1982); Webb v. Richardson, 472 F. 2d 529, 536 (6th Cir. 1972); Dawson v. Finch, 425 F. 2d 1192, 1195 (5th Cir.), cert. denied, 400 U.S. 830 (1970); see also Harris v. Secretary of Health & Human Servs., 836 F. 2d 496, 498 n. 1 (10th Cir. 1987) (noting agreement among other circuits).



The linchpin of Bartels' argument is that the Secretary disobeyed the district court's order by not including interim benefits as part of past due benefits. This contention is without merit. The order clearly did not envision, let alone require, the inclusion of interim benefits as part of past due benefits. The law in the Eastern District of Arkansas was set forth by two cases decided in the two weeks prior to the order in the instant case. In both Pittman v. Bowen, No. J-C-84-114, slip op. at 2 (E.D. Ark. June 9, 1987), and Gowen v. Bowen, No. J-C-83-386, slip op. at 2 (E.D. Ark. June 12, 1987), the district court found that it had "no authority to award attorney's fees from . . . interim benefits." We vacated this judgment in the two cases in Gowen, 855 F. 2d at 619.⁴ The concluding

4. The appeals from the district court's orders in Pittman and Gowen were consolidated for purposes of review.

paragraph in the district court's order in this case (quoted supra) was, but for dollar amounts, exactly the same as the paragraphs setting forth the fee awards in Pittman, slip op. at 4, and Gowen, slip op. at 4.⁵ Moreover, the order did not address the relationship between interim and past due benefits, as Pittman and Gowen had. It is clear, then, that the district court's order was intended to follow the result in these two cases by not awarding attorney's fees out of interim benefits.⁶ Therefore, the

Gowen, 855 F. 2d at 614 n.1. Bartels represented the appellant's in both cases. Id.

5. Bartels was the attorney who petitioned for and received the fee awards in Pittman and Gowen.
6. Bartels' involvement in the Pittman and Gowen cases, see supra notes 4 and 5, indicates that he was or should have been fully aware of the district court's intent. In view of this, we find it disturbing that Bartels now contends the Secretary "chose" to disregard "the specific orders" of the district court. Brief for Appellant at 6. Indeed, the contempt motion here approaches the limit of responsible advocacy.



district court properly denied Bartels' contempt motion because the Secretary fully complied with the express terms and intent of the order.

Bartels argues that our decision in Gowen should be applied retroactively. This argument is entirely inconsistent with Bartels' primary contention that the Secretary disobeyed the district court's order. If the district court had in fact ordered that interim benefits be included as part of past due benefits, then there would be no need to apply Gowen retroactively because from the outset the order would have required adherence to the rule announced later in Gowen. Bartels does not explain this inconsistency. Nor does he cite any authority for the unstated proposition that a party, despite having fully complied with the terms and intent of a court order, should nevertheless be held in contempt if its conduct would have violated the order if



the order had been consistent with a subsequent change in the law by an appellate court decision. Accordingly, there is no reason for us to decide whether Gowen should apply retroactively.

III.

Finding no abuse of discretion, we affirm the district court's order denying Bartels' motion to hold the Secretary in contempt.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,

EIGHTH CIRCUIT.



APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

Civil No. J-C-84-136

AVON DAVIS, PLAINTIFF

v.

SECRETARY OF HEALTH
AND HUMAN SERVICES, DEFENDANT

[FILED DECEMBER 14, 1988]

ORDER

The motion of the plaintiff's attorney, Anthony W. Bartels, requesting this court to find the Secretary in contempt of the June 22, 1987 order entered herein is denied.

IT IS SO ORDERED this 12th day of December, 1988.

/s/Henry Woods
HENRY WOODS, U.S. DISTRICT JUDGE



APPENDIX C

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

NO. 89-1042-EA

AVON DAVIS, APPELLANT

V.

LOUIS W. SULLIVAN, SECRETARY OF
HEALTH AND HUMAN SERVICES, APPELLEE

**Order Denying Petition for
Rehearing and Suggestion for
Rehearing En Banc**

Appellant's suggest for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

December 12, 1989

Order Entered at the Direction of the Court:

/s/Robert D. St. Vrain
Clerk, United States Court of Appeals,
Eighth Circuit.



APPENDIX D

RELEVANT STATUTORY PROVISIONS

20 C.F.R. § 404.1720 (b) (4),

provides in pertinent part:

(b) Charging and receiving a fee.
(1) The representative must file a written request with us before he or she may charge or receive a fee for his or her services.

* * * *

(4) If the representative is an attorney and the claimant is entitled to past-due benefits, we will pay the authorized fee, or a part of the authorized fee directly to the attorney out of past-due benefits subject to the limitations described in § 404.1730 (b) (1). If the representative is not an attorney we assume no responsibility for the payment of any fee that we have authorized.

20 C.F.R. § 404.1730 (b), provides in pertinent part:

(b) Fees we may authorize--(1) Attorneys. Except as provided in paragraph (c) of this section, if we make a determination or decision in favor of a claimant who was represented by an attorney, and as a result of the determination or decision past-due benefits are payable, we will pay the attorney out of the past-due benefits the smallest of--



(i) Twenty-five percent of the total of past-due benefits;

(ii) The amount of the fee that we set; or

(iii) The amount agreed upon between the attorney and the claimant represented.

20 C.F.R. § 404.501 (a) (8) provides in pertinent part:

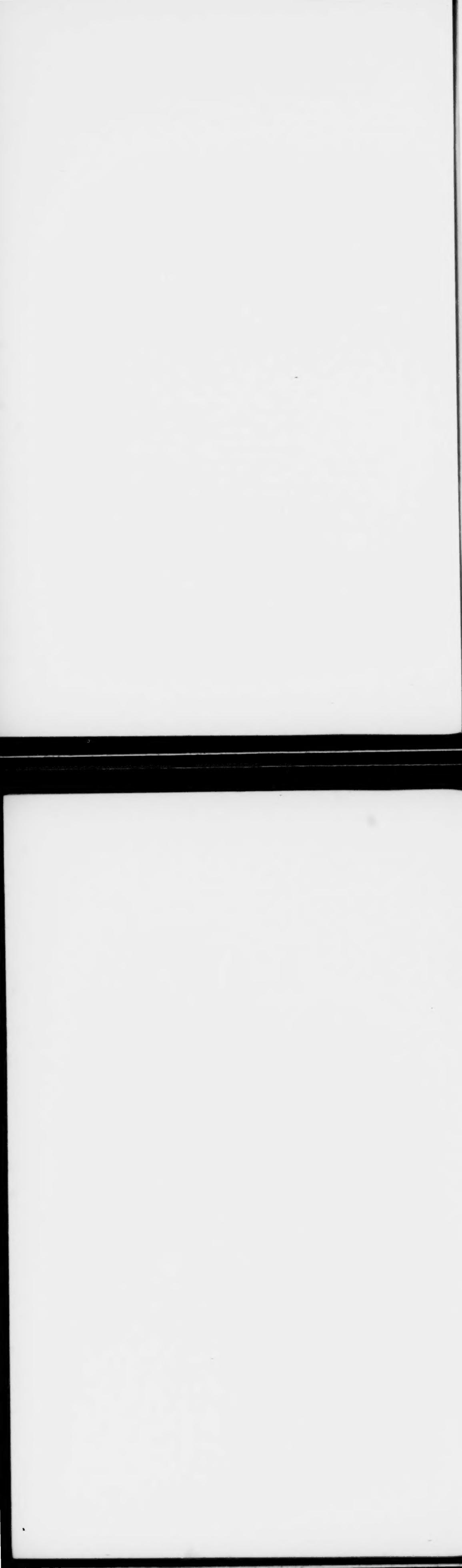
(a) In general. Section 204 of the Act provides for adjustment as set forth in §§ 404.502 and 404.503, in cases where an individual has received more or less than the correct payment due under title II of the Act. As used in this subpart, the term "overpayment" includes a payment in excess of the amount due under title II of the Act, a payment resulting from failure to impose deductions or to suspend or reduce benefits under sections 203, 222 (b), 224, and 228 (c), and (d), and (e) of the Act (see Subpart E of this part), a payment pursuant to section 205 (n) of the Act in an amount in excess of the amount to which the individual is entitled under section 202 or 223 of the Act, a payment resulting from the failure to terminate benefits, and a payment where no amount is payable under title II of the Act The provisions for adjustment also apply in cases where through error:

* * *

(8) A payment of past due benefits is made to an individual and such payment has not been reduced by the



amount of attorney's fees payable directly to an attorney under section 206 of the Act (see § 404.977).



APPENDIX E

DEPARTMENT OF HEALTH & HUMAN SERVICES
Social Security Administration
Office of Hearings and Appeals
P. O. Box 3200
Arlington, Virginia 22203

Refer to:

S3GL91

500-32-7009

Mr. Anthony Bartels

Attorney at Law

316 South Church

Jonesboro, Arkansas 72401

Dear Mr. Bartels:

This is in reference to your fee petition dated June 22, 1987, in the Social Security claim of Avon Davis. Since the court order of June 18, 1987, has limited the total fee to twenty-five percent of

EXHIBIT H

September 16, 1988

Ms. Dorothy H. Figaroore
Attorney Fee Officer
Office of Hearings and Appeals
P. O. Box 3200
Arlington, Virginia 22203

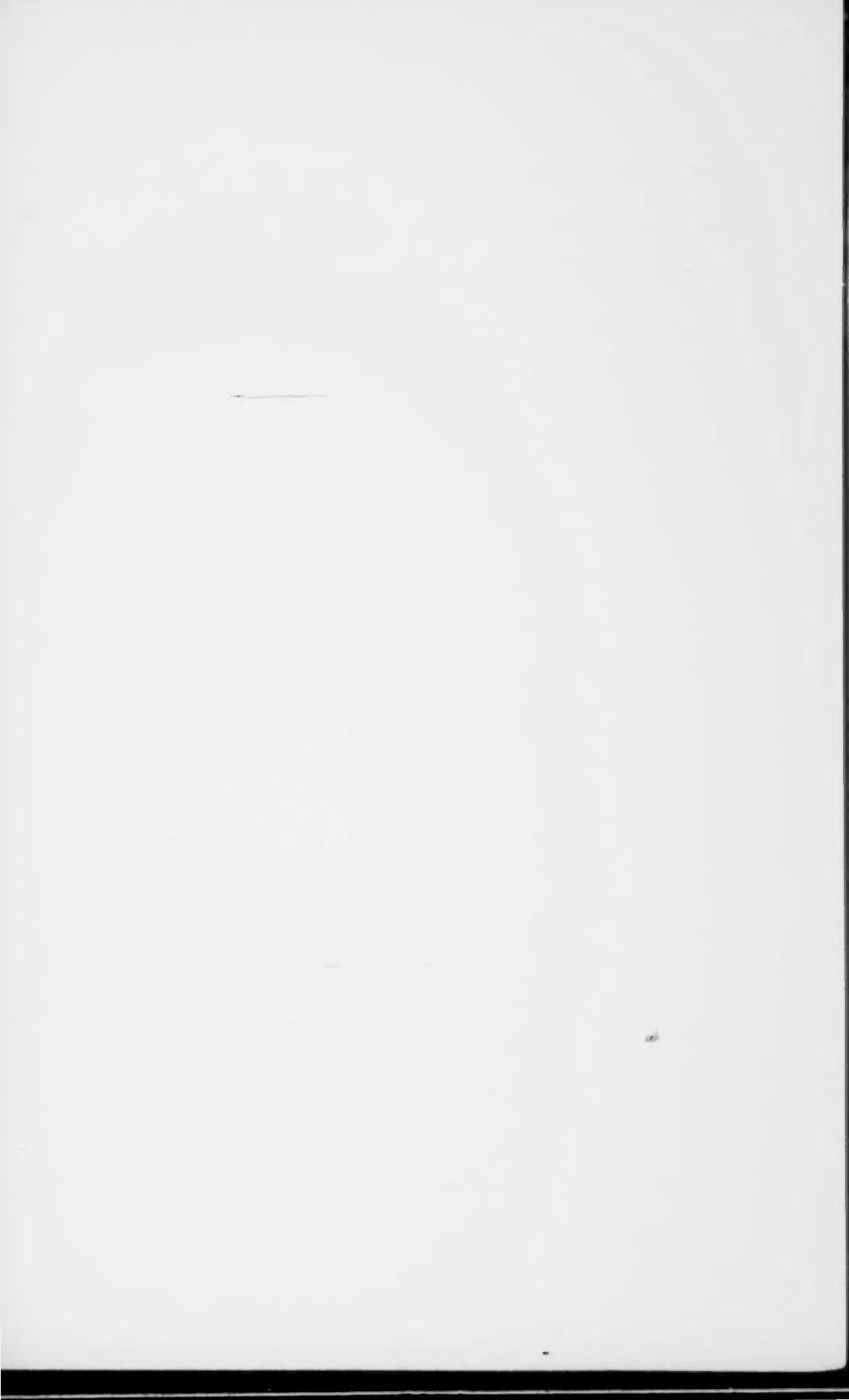
RE: Avon Davis

SSN: 500-32-7009

My File: 84-3

Dear Ms. Figaroore:

As per your letter of October 26, 1987, the 8th Circuit has now ruled on the "interim benefit" issue. I enclose a copy of that decision.



the past due benefits, which is \$1,551.30
and which has been paid to you per the
court order, no further fee can be
authorized for services before the Social
Security Administration.

Sincerely yours,

Dorothy H. Figaroore

Attorney Fee Office

cc:

Avon Davis

Route 3, Box 236

Paragould, AR 72450



EXHIBIT F

September 25, 1987

Ms. Dorothy H. Figaroore
Attorney Fee Officer
Office of Hearings and Appeals
P. O. Box 3200
Arlington, Virginia 22203

RE: Avon Davis
SSN: 500-32-7009
My File: 84-3

Dear Ms. Figaroore:

I have a copy of your September 21st letter regarding the above claim, a copy of which I have enclosed for your easy reference.



I have requested as a fee 1/4 of the claimant's benefits from the time he was cut off of disability benefits until the time that Social Security rendered their favorable decision. The law interprets "Past Due Benefits" to mean "withheld benefits" plus "interim benefits." Ruby L. Davis v. Margaret M. Heckler, Secretary of HHS, Eastern District of Tennessee, Northern Division, Case No. Civ. 3-84-96 (1984) (Unpublished Decision). I have enclosed a copy of the Davis Order.

This issue is currently on appeal in the Eighth Circuit Court of Appeals, but a decision has not been rendered at this time. You may want to hold my fee petition until the issue has been decided. The two cases that are now pending in the 8th Circuit Court of Appeals dealing with the interim benefit issue are: Buford Gowen v. Secretary of HHS, No. 87-1995EA,



and Louie Pittman v. Secretary of HHS, No.
87-1995EA.

I look forward to your advice.

Sincerely,

Anthony W. Bartels

AWB/bc

Encl: stated.

cc: Avon Davis

Route 3, Box 236

Paragould, Arkansas 72450



EXHIBIT G

DEPARTMENT OF HEALTH & HUMAN SERVICES
Social Security Administration
Office of Hearings and Appeals
P. O. Box 3200
Arlington, Virginia 22203

Refer to:

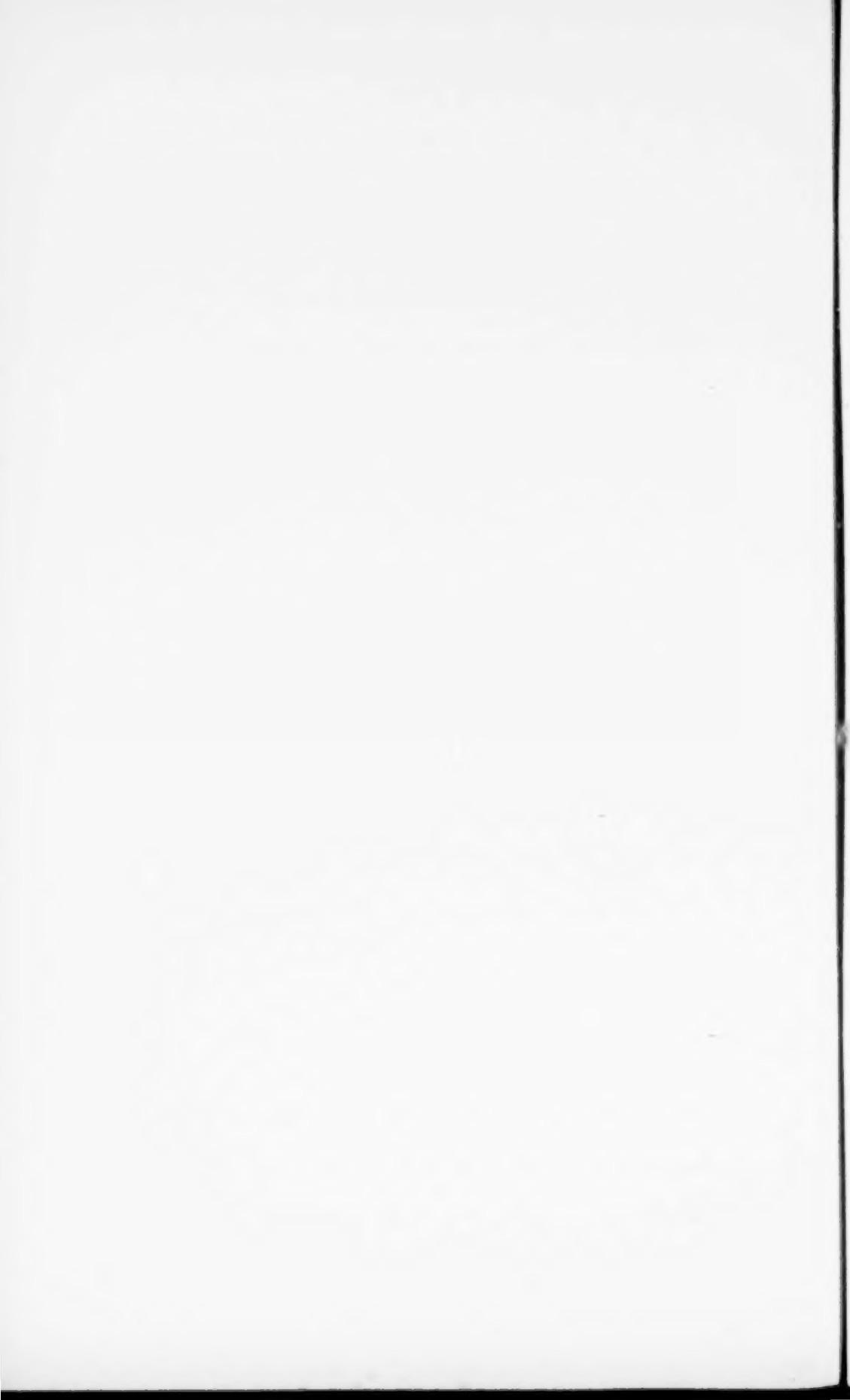
S3GL91

500-32-7009

Mr. Anthony Bartels
Attorney at Law
316 South Church
Jonesboro, Arkansas 72402-0896

Dear Mr. Bartels:

This is in reference to your letter dated September 25, 1987. We will hold your petition until the court issues its decision.



Sincerely yours,

Dorothy H. Figaroore
Attorney Fee Officer

CC:

Ms. Avon Davis
Route 3, Box 236
Paragould, Arkansas 72450



Please make a determination on my fee
petition regarding Avon Davis' claim.

Sincerely,

Anthony W. Bartels

AWB/bc

Encl: stated.

EXHIBIT I

DEPARTMENT OF HEALTH & HUMAN SERVICES
Social Security Administration
Office of Hearings and Appeals
P. O. Box 3200
Arlington, Virginia 22203

Refer to:

S3GL91

500-32-7009

Mr. Anthony Bartels
Attorney at Law
316 South Church
Jonesboro, Arkansas 72401

Dear Mr. Bartels:

This is in reference to your letter of September 16, 1988, in the Social Security claim of Avon Davis. The court order which you sent concerns two other cases.



However, in this case, the court order dated June 18, 1987, states:

The Secretary will then coordinate any fees granted for such representation with the amount granted by the Court so that the maximum allowed fee will not exceed twenty-five percent of the plaintiff's past-due benefits.

Since the court has awarded more than 25 percent of the past-due benefits, no further action can be taken on your petition.

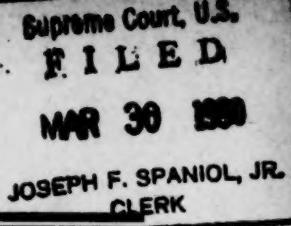
Sincerely yours,
Dorothy H. Figaroore
Attorney Fee Officer

cc:

Avon Davis
Route 3, Box 236
Paragould, Arkansas 72450

No. 89-1212

(2)



In the Supreme Court of the United States

OCTOBER TERM, 1989

AVON DAVIS, PETITIONER

v.

LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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13 pp

QUESTION PRESENTED

Whether the Secretary of Health and Human Services should be held in contempt of court for excluding interim Social Security benefits paid to the claimant in calculating the fee of claimant's attorney, when the district court's order pursuant to which the Secretary acted also excluded those interim benefits.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15-25) is reported at 894 F.2d 271. The order of the district court (Pet. App. 26) is unreported.

JURISDICTION

The decision of the court of appeals was entered on October 25, 1989. A petition for rehearing was denied on December 12, 1989 (Pet. App. 27). The

petition for a writ of certiorari was filed on January 16, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Title 42, U.S.C., Section 406(b)(1) provides in relevant part:

Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Secretary may * * * certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.

Title 20, C.F.R., Section 404.1703, defines past-due benefits as:

[T]he total amount of benefits payable under title II of the Act to all beneficiaries that has accumulated because of a favorable administrative or judicial determination or decision, up to but not including the month the determination or decision is made.

STATEMENT

1. Petitioner brought this action seeking judicial review of a decision of the Secretary of Health and Human Services holding that his disability had

ceased and that he was no longer entitled to Social Security disability benefits (Pet. App. 16). While his case was pending in the district court, the Social Security Disability Benefits Reform Act of 1984 (1984 Disability Amendments), Pub. L. No. 98-460, § 2, 98 Stat. 1794-1799 (codified as amended at 42 U.S.C. 423), was enacted. The district court granted the Secretary's motion to remand the case for further administrative review under the new statute (Pet. App. 16).¹

Upon remand, petitioner elected to receive interim benefits.² Following additional development of the record and completion of administrative proceedings on remand, the Secretary held that petitioner's disability benefits should be reinstated (Pet. App. 17). The Secretary calculated that petitioner was entitled to \$6,205.20 in past-due benefits as a result of the favorable decision. In accord with his practice at that time, the Secretary did not include petitioner's interim benefits in calculating his past-due benefits for the purpose of computing attorney fees (*ibid.*). Therefore, pursuant to 42 U.S.C. 406, the Secretary withheld \$1,551.30 (25% of \$6,205.20) for a possible fee award to petitioner's attorney (Pet. App. 17). The remaining \$4,653.90 was paid to petitioner.

¹ Section 2 of the 1984 Disability Amendments provided a new standard for review of termination of disability benefits.

² Section 2(e) of the 1984 Disability Amendments provided that certain previously terminated claimants could elect to receive interim benefits beginning with the month of the election and ending when an initial redetermination was made by the Secretary. 42 U.S.C. 423(g)(1)(C). This statutory payment option was created to maintain the status quo, easing financial and emotional hardships that might otherwise be incurred from the termination of benefits. Petitioner received approximately \$15,000 in interim benefits (Pet. App. 17).

2. Petitioner's attorney, Anthony W. Bartels, petitioned the district court for an attorney fee award under 42 U.S.C. 406(b)(1). The district court's order awarding the fee concluded (Pet. App. 17-18):

it is Ordered and Decreed that an attorney's fee and costs in the amount of \$2,171.25 from the past-due benefits due the [petitioner], is hereby allowed to Anthony W. Bartels, the [petitioner's] attorney, pursuant to 42 U.S.C. § 406(b) (1). The [respondent] is hereby ordered to compute, certify and pay said attorney this sum, in addition to any fees found to be due for representation at the administrative level, or twenty-five percent of the [petitioner's] past-due benefits, whichever sum is less.

The order was silent as to whether interim benefits were to be included in this calculation. Approximately two weeks prior to the entry of the order, however, the same district judge had held in two similar cases in which Bartels was also the claimant's attorney that there was "no authority to award attorney's fees from . . . interim benefits." Pet. App. 22 (citing *Gowen v. Bowen*, No. J-C-83-386 (E.D. Ark. June 12, 1987), slip op. 2, and *Pittman v. Bowen*, No. J-C-84-114 (E.D. Ark. June 9, 1987), slip op. 2). Accordingly, the Secretary in this case adhered to his previous interpretation, which excluded interim benefits from past-due benefits. The Secretary paid Bartels \$1,551.30, representing the lesser of \$2,171.25 or 25% of petitioner's past-due benefits, excluding the interim payments (Pet. App. 18).

3. Bartels then petitioned the Secretary for attorney fees for services performed in this case at the administrative level. See 42 U.S.C. 406(a). The Sec-

retary, interpreting the court order as imposing a cap of 25% of the past-due benefits on the total amount of the fee award,³ advised Bartels that no additional fee could be awarded because he had already been paid the full amount available under the district court order for his work in the district court (Pet. App. 31-32).

Bartels informed the Secretary of his view that past-due benefits should include interim benefits, and asked that his administrative fee application be held pending the Eighth Circuit's decision in *Gowen v. Bowen* and *Pittman v. Bowen*, which raised this issue (Pet. App. 33-35). The Secretary agreed to this request (*id.* at 36-37).

4. The Eighth Circuit reversed the two district court decisions in *Gowen* and *Pittman*, and held that 42 U.S.C. 406(b)(1) includes interim benefits as part of the definition of past-due benefits for the purpose of calculating attorney fees. *Gowen v. Bowen*, 855 F.2d 613 (1988); see also *Shoemaker v. Bowen*, 853 F.2d 858 (11th Cir. 1988); *Condon v. Bowen*, 853 F.2d 66 (2d Cir. 1988); but see *Rodriguez v. Secretary of HHS*, 856 F.2d 338 (1st Cir. 1988) (interim benefits *not* included in definition of past-due benefits).

5. The Secretary thereupon reaffirmed his original denial of Bartels' request for an award of fees for his administrative work in this case.⁴ There had been

³ The court of appeals eventually agreed with this interpretation of the district court's order (Pet. App. 21).

⁴ The district court never issued any order regarding fees at the administrative level. The authority to award fees for administrative level work is committed to the Secretary; his determination in this regard is unreviewable. Pet. App. 19, citing 42 U.S.C. 406(b)(1); *Gowen v. Bowen*, 855 F.2d 613,

no appeal challenging the Secretary's interpretation of the court's fee award in this case, nor any attempt to obtain a clarification of the court's order making that award. Nevertheless, more than sixteen months after the entry of that order, Bartels moved to hold the Secretary in contempt for failing to comply with the original fee order. Bartels alleged that the original fee order required use of the rule subsequently articulated in *Gowen*, and thus that the interim benefits should have been included in calculating the sum available to pay his fee. In his motion for contempt, Bartels sought an order requiring that: (1) the remaining \$619.95 of the claimed fee for district court work be paid based on interim benefits; (2) the amount remaining from 25% of past-due benefits be used to pay his fee for work in the administrative proceeding; and (3) an attorney fee be awarded for filing the contempt motion. Pet. App. 18-19.

The district court denied Bartels' motion without comment (Pet. App. 26). The Eighth Circuit affirmed, ruling that "the Secretary fully complied with the express terms and intent of the [district court] order" (*id.* at 24). The court of appeals found "it disturbing that Bartels now contends the Secretary 'chose' to disregard 'the specific orders' of the district court" because Bartels "was or should have been fully aware of the district court's intent;" the court further noted that "the contempt motion here approaches the limit of responsible advocacy" (*id.* at 23 n.6).

618 (8th Cir. 1988); *Fenix v. Finch*, 436 F.2d 831, 838 (8th Cir. 1971).

ARGUMENT

Bartels seeks further review of the denial of his motion to hold the Secretary in contempt; although the court below correctly found the Secretary had fully complied with the district court's order.

1. It is far from clear that there is a proper petitioning party in this case. Bartels, an attorney, identifies Avon Davis as the petitioner, but then asserts that he is himself petitioning for review (Pet. 1) and refers to his relationship with his client Davis in the past tense (Pet. 3). Moreover, because Bartels seeks to compel the Secretary to withhold future benefits due Davis for payment to Bartels, the petition asserts interests that are antithetical to those of Davis.⁵ Cf. *United States Dep't of Labor v. Triplett*, No. 88-1671 (Mar. 27, 1990), slip op. 5. Indeed, if Davis were to be represented in this case in this Court, he would clearly appear as a respondent, not a petitioner. We are aware of no case that suggests that an attorney is entitled to petition this Court to reopen issues long resolved in the client's favor. Cf. *Diamond v. Charles*, 476 U.S. 54, 69-71 (1986). In any event, the issues Bartels presents are so evidently without merit that no further review is appropriate in this case.

2. The Eighth Circuit's decision in *Gowen* did not change the meaning of the order the district court had entered in this case fourteen months earlier. Contempt proceedings "do[] not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed." *Maggio v. Zeitz*, 333 U.S. 56,

⁵ This is not the first time that Bartels has sought to raise interests antithetical to those of the named petitioner, without establishing any present right to represent that petitioner. See *Trekas v. Sullivan*, cert. denied, 110 S. Ct. 80 (1989); *Russell v. Sullivan*, cert. denied, No. 89-1130 (Mar. 19, 1990).

69 (1948). See *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374-375 (1940).

Moreover, the meaning of that order at the time it was entered should have been as evident to Bartels as it was to the Secretary. The court of appeals was clearly correct in finding that Bartels "was or should have been fully aware of the district court's intent" that interim benefits be excluded in calculating past-due benefits (Pet. App. 23 n.6). As the court of appeals explained, Bartels was the attorney who received fees in *Pittman v. Bowen*, No. J-C-84-114 (E.D. Ark. June 9, 1987), and *Gowen v. Bowen*, No. J-C-83-386 (E.D. Ark. June 12, 1987), which were decided by the same district court shortly before the order in the instant case (Pet. App. 22-23). In both *Pittman* and *Gowen* the district court ruled that it had "no authority to award attorney's fees from . . . interim benefits" (*id.* at 22 (quoting *Pittman*, slip op. 2, and *Gowen*, slip op. 2)). The relevant portion of the order in this case was identical to the orders in *Pittman* and *Gowen* (Pet. App. 23). "It is clear, then, that the district court's order was intended to follow the result in these two cases by not awarding attorney's fees out of interim benefits" (*ibid.*).⁶

3. Violation of a court order is a prerequisite for a finding of civil contempt. *Hicks v. Feiock*, 485 U.S. 624 (1988); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 795-796 (1987); *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949). Since "the Secretary fully complied with the express terms and intent of the order" (Pet. App. 24), Bartels' motion for contempt was so patently without merit that the court of appeals correctly concluded

⁶ If Bartels wanted to contest the district court's decision, he should have appealed it, as he did the orders in *Pittman* and *Gowen*.

that it "approaches the limit of responsible advocacy" (*id* at 23 n.6).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1990